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No. 81-41

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOAN A. HAGANS, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner, an employee of the Department of the Interior, commenced this action in the United States District Court for the District of Alaska, claiming that she had been denied a promotion because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In support of her claim, petitioner asserted that she was qualified for the position, but that the Department selected a man, instead of her, after consideration of a field of applicants. At trial, the district court concluded that petitioner had failed to establish a prima facie case of discrimination and therefore entered judgment for the government at the conclusion of petitioner's case-in-chief. The district court based its holding on the ground that petitioner had failed to satisfy the fourth prong of the test established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), that is, that she failed to show that the position remained open after her rejection (Pet. App. 19a). However, the district court also based its holding on the fact that

"[n]o competent, reliable or relevant evidence [was] introduced by [petitioner] which reasonably links her rejection for the sought-after position 'in a way that plainly suggests' sexual discrimination, nor has any other evidence been introduced which reasonably links her rejection with sexual discrimination on the part of [the government]" (*ibid.*, quoting *Miller* v. *Williams*, 590 F. 2d 317, 320 (9th Cir. 1979)).

The court of appeals reversed (Pet. App. 1a-14a), holding that the district court had construed the *McDonnell Douglas* test too rigidly. The Ninth Circuit noted (Pet. App. 7a) that this Court had observed in *McDonnell Douglas*, after setting out the four-part test, that the proof required to establish a prima facie case would depend on the facts, and that the four-part test would "not necessarily [apply] in every respect to differing factual situations" (411 U.S. at 802 n.13). Relying on this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the court of appeals interpreted *McDonnell Douglas* to require that a Title VII plaintiff offer sufficient evidence to give rise to an inference that the rejection was discriminatory, but it declined to state what specific evidence would suffice (Pet. App. 7a). The court of appeals further suggested that the district court had misconstrued its holding in *Miller* v. *Williams*, *supra*, because "[t]he district court's statement that the evidence must 'plainly suggest' sexual discrimination states too stringent a test for a prima facie case" (Pet. App. 9a). Accordingly, the court of appeals remanded the case and charged the district court with determining whether the evidence was "sufficient to create an inference that sex was the likely reason for the denial of the job opportunity" (*ibid.*).

2. The standard articulated by the court of appeals in this case for establishing a prima facie case of unlawful promotion discrimination under Title VII is consistent with the

holdings of this Court in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), and *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981). Further review of petitioner's claim is therefore unwarranted.

a. The Court first considered the elements of a prima facie case under Title VII in *McDonnell Douglas Corp.* v. *Green*, *supra*, where, in the employment application context, it held that the plaintiff had established a prima facie case by showing that he was a member of a protected class, that he had applied and was rejected for a job for which he was qualified, and that the employer thereafter left the position unfilled. The employer's decision to leave the position open, rather than fill it with a concededly qualified applicant, was contrary to common experience and therefore gave rise to an inference of discrimination. Such an inference may be made because, as the Court noted in *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 577, "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."

The evidence necessary to establish a prima facie case depends upon the particular context in which the discrimination is alleged to have occurred. See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 802 n.13; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-358. It is necessary, however, for a plaintiff to show "actions taken by the employer from which we infer discriminatory animus." *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 579-580.

Indeed, this Court has recently reaffirmed the rationale of these cases by emphasizing that a Title VII plaintiff must establish a prima facie case by showing that he was rejected "under circumstances which give rise to an inference of

unlawful discrimination." *Texas Department of Community Affairs* v. *Burdine*, *supra*, slip op. 5. The Court further explained that such evidence must be sufficient to "create[] a presumption that the employer unlawfully discriminated against the employee" (*ibid.*). And, for the first time, the Court specified: "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case" (*id.* at 5-6). An accompanying footnote explained that "[t]he phrase 'prima facie case' " is intended in this context to "denote * * * the establishment of a legally mandatory, rebuttable presumption," rather than merely a "plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue" (*id.* at 6 n.7). The Ninth Circuit's holding that "a proper prima facie case identifies sex as the likely reason for the denial of a job opportunity" (Pet. App. 7a; citations omitted) is therefore consistent with this Court's decisions.

b. Petitioner contends (Pet. 7) that this Court should grant the petition to resolve a conflict among the circuits, citing *Aikens* v. *United States Postal Service*, 642 F. 2d 514 (D.C. Cir. 1980), vacated and remanded, No. 80-1737 (June 29, 1981), and *Pettit* v. *United States*, 488 F. 2d 1026 (Ct. Cl. 1973). However, the decision of the court of appeals in *Aikens* has been vacated, and the decision of the Court of Claims in *Pettit* is consistent both with this Court's decision in *Burdine* and with the decision of the court of appeals here.

In *Aikens*, the District of Columbia Circuit held that a Title VII plaintiff alleging discrimination in the promotion context may establish a prima facie case simply by showing that he is a member of a protected class, that he applied for a position for which he was minimally qualified, and that the position was awarded to another, non-minority applicant.

The government petitioned for a writ of certiorari on the ground that the holding of the court of appeals was inconsistent with the Court's decision in *Burdine*. In its petition, the government argued that the elements identified by the court of appeals were insufficient in that context to show that plaintiff was rejected under circumstances which give rise to an inference of discrimination because, in the promotion context, where many applicants may be minimally qualified for a single vacancy, there is no logical basis for recognizing a presumption that the employer unlawfully discriminated against the employee whenever an employee shows only that he belongs to a protected class and that he was not selected for a position for which he was minimally qualified. On June 29, 1981, the Court granted the government's petition, vacated the judgment, and remanded the case to the court of appeals for reconsidertion in light of *Burdine*.

In *Pettit*, the Court of Claims found that the plaintiff had made out a prima facie case of promotion discrimination by showing that he belonged to a racial minority, that he was qualified for promotion and might have reasonably expected selection for promotion, that he was not selected for promotion, and that the supervisory employees having responsibility to make the decision betrayed a predisposition for discrimination in other matters.

Although the Ninth Circuit, following *Burdine*, requires that a plaintiff demonstrate, as part of the prima facie case, that he or she was rejected in circumstances that give rise to an inference of discrimination, the Ninth Circuit also recognized that the facts giving rise to the inference will necessarily vary from case to case (Pet. App. 8a). In *Pettit*, the plaintiff demonstrated that he was rejected under circumstances giving rise to an inference of discrimination by showing that the specific supervisors involved had a history

of discrimination. While there could be other factors that would also give rise to such an inference, there is clearly no conflict between *Pettit* and the decision below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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